No. 93-44

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Supreme Court Of The United States

October Term 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Reply Brief for Appellant Time Warner Entertainment Company, L.P.

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Reply Brief for Appellant Time Warner Entertainment Company, L.P.

ARGUMENT

In responding to the challenges brought by appellant Time Warner Entertainment Company, L.P. ("Time Warner") and others against the constitutionality of the "must-carry provisions", the federal appellees[1] principally urge the Court to rewrite its decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), a decision heretofore considered inextricably linked to the unique, physically limited nature of the broadcast spectrum.[2]

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[1] The federal appellees will hereafter be referred to as "the government" and citations to their brief will be in the form of Gov. __.

[2] *See infra* note 10.

Under the government's reading of *Red Lion*, Congress may, whenever it perceives a "market in speech" to be "dysfunctional", take affirmative measures to advance whatever First Amendment interests it believes are hindered by the dysfunction. Further, the government proposes that whether the legislature's action is content-based does not matter. That is, essentially conceding that the must-carry provisions are content-based and thus not sustainable under the standard of review thereby applicable, the government tortures both the language and the logic of *Red Lion*, attempting to make its more lenient standard apply. However, there is no authority to support this extension of *Red Lion*, nor would any rational principle of law provide government, ostensibly constrained—not empowered—by the command of the First Amendment, with such unbridled power.

The appellees representing the broadcast industry do not subscribe to the government's expansive reading of *Red Lion*.[3] Instead, arguing that government's purpose always determines whether legislation is content-based, they contend that Congress did not intend to suppress speech; that therefore the must-carry provisions are content-neutral; and that these provisions should be subject to at most minimal judicial review. Given that the must-carry provisions alter the content of video programming that cable operators provide subscribers and replace it with content Congress largely selects, appellees' focus on something other than their effect is not surprising. In appellees' calculus, the freely exercised editorial decisions of cable operators are not relevant, nor is the government's deliberate choice to favor only broadcast television—the programming over which the government already exercises the greatest content control—at the expense of competing cable programming services. By arguing at length that

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[3] The briefs of National Association of Broadcasters ("NAB"), Association of Independent Television Stations, Inc. ("INTV"), and the public broadcasting entities (Association of America's Public Television Stations, Public Broadcasting Service and Corporation for Public Broadcasting) (collectively "PBS") will be cited as NAB __, INTV __, or PBS __. Collectively, Time Warner will refer to these particular appellees as the "broadcast appellees". General references to "appellees" means both the broadcast appellees and the government.

the must-carry provisions are not content-based, the broadcast appellees only emphasize the government's apparent concession.

Appellees also take the position that Congress's fact-finding is entitled to the highest level of deference from the courts, particularly its conclusion that the broadcasting industry is in imminent economic peril. Appellees' position is to be expected. Only under such a relaxed standard of review could Congress's "findings" be validated. Such deference, however, should not apply here in light of the substantial intrusion upon the First Amendment rights of cable operators and programmers. Moreover, appellees fail to indicate why an obviously less speech restrictive alternative—direct subsidies—does not require invalidation of the must-carry provisions. Essentially, appellees ask that these provisions be upheld merely because Congress has acted. Such has not been the law for nearly two hundred years.

I. MERE RATIONAL BASIS REVIEW SHOULD NOT BE APPLIED TO THE MUST-CARRY PROVISIONS.

The government principally contends that, by subjecting the must-carry provisions to analysis under *United States v. O'Brien*, 391 U.S. 367 (1968), the majority below applied too rigorous a standard of review. Gov. 13. Rather than an *O'Brien* analysis (or the strict scrutiny advocated by appellants), the government proposes that these provisions "should be analyzed under a different framework—this Court's precedents governing legislative efforts to correct market failure in a market *whose commodity is speech*", in particular, *Red Lion*. Gov. 13, 16-17 (emphasis added). In the government's view, Congress must act "to protect the 'paramount' First Amendment interests of viewers" and to ensure the availability of a diversity of programming and information, Gov. 17, and those actions, even if directly aimed at content, need only be "reasonable". *Id.*

The need to stretch existing law for a rationale under which content-based regulation outside the broadcast industry could survive is quite telling. To date, however, that industry is the only context in which such draconian and intrusive regulation has been allowed, and it has been allowed because of a single reason—the physically limited nature of the broadcast spectrum. Conceding

that a similar scarcity does not characterize cable, Gov. 22, the government seeks to rewrite the reasons why it has been allowed to regulate the content of broadcasters' programming in order to obtain a similar power over cable. The argument lacks any basis in law.

A. Cases upholding enforcement of generally applicable laws do not dictate rational basis review here.

The government contends that *Associated Press v. United States*, 326 U.S. 1 (1945), and *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), support applying rational basis review to "legislative efforts to correct market failure in a market whose commodity is speech". Gov. 17. Foremost, the government's argument is misguided, because these cases have nothing to do with "legislative efforts" regarding "markets" whose "commodity" is speech.[4] Rather, they involved attempts by courts to fashion relief under the generally applicable Sherman Act upon adjudicated violations of the Act. The government's preoccupation with these cases is thus perplexing. But even beyond this failing, these cases fail to help the government here.

In *Associated Press*, the membership by-laws prevented members from distributing news to nonmembers and, through onerous membership requirements, effectively blocked nonmember competitors from joining the association. The district court held, and this Court agreed, that AP's by-laws constituted unlawful concerted conduct in restraint of trade under the Sherman Act. 326 U.S. at 11, 18. Likewise, the Sherman Act violation presented in *Lorain Journal* was the result of a newspaper carrying out a plan to eliminate competition in a local advertising market presented by a new radio station. The district

[4] The government's use of the oxymoron—"commodity" of speech—demonstrates the disdain with which it treats cable's speech under the First Amendment. The relevant point, given grudging acknowledgment by the majority below and then ignored, is that regulation of video programming, unlike most regulation of printing presses or loudspeakers, regulates pure speech. *See* J.S. App. 12a (video signals "can only be used to convey a message").

court found a "purpose and intent" to destroy the station—conduct prohibited by § 2 of the Sherman Act. 342 U.S. at 148-49. This Court affirmed.

Contrary to the government's claim, it was not relevant in either case that the markets at issue to some degree implicated speech interests. The Sherman Act applied because unlawful conduct had impermissibly restrained trade. *Associated Press* clearly makes this point. 326 U.S. at 7 ("All are alike covered by the Sherman Act. The fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his *business practices*.") (emphasis added). Thus, the print media are no more immune from a *general law* prohibiting business practices restraining trade in news than would be any other business from conduct creating unreasonable trade restraints. *Id.* at 18-19 (restraint on trade in news compares to restraints on trade in tiles, lumber, enameled ironware or women's clothes).[5]

Unlike a general law regulating *business* practices, the must-carry provisions selectively target certain members of the press and dictate the content of video programming they must deliver to the public. The government, though acknowledging the difference, Gov. 18, downplays its significance, proposing that "it should not matter" whether an infringement of First Amendment activity "results from a statute directed to the cable industry rather than from a specific decree implementing a general statute", because the remedies imposed in each case "directly altered the defendant speaker's communicative activity". Gov. 18-19. And, the government asserts that "there is no

[5] It is also an important distinction that both cases involved adjudications by neutral fact-finders based on full factual records. Various appellees, particularly INTV, and the court below, though analogizing the must-carry provisions to antitrust laws, fail to acknowledge that the government has not proven even a single anticompetitive violation in this context. Instead, Congress has assumed that all cable operators have engaged in anticompetitive conduct and enacted a prophylactic rule so broad as to encompass even those cable operators that have never dropped any local broadcast station.

suggestion that Congress was up to anything 'nefarious'". Gov. 19.

The government misses the point. This Court consistently has held that the distinction between general and specific laws is not inconsequential, but one of a constitutional dimension, requiring heightened judicial scrutiny in the case of the latter. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581-86 (1983); *Leathers v. Medlock*, 111 S. Ct. 1438, 1443 (1991).[6] This is so exactly because selective regulation of the press inherently presents the danger of governmental suppression. Thus, an improper purpose is presumed for such laws, and they are not tolerated, absent the most compelling reasons.[7]

As for the government's suggestion that remedies may directly alter protected speech activities, this Court made clear in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974),

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[6] *See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2226 (1993) (strict scrutiny applies under free exercise clause to laws that are not generally applicable and that burden particular religious practices, whereas more relaxed scrutiny applies to laws that are generally applicable and incidentally burden religious practices); *Cohen v. Cowles Media Corp.*, 111 S. Ct. 2513, 2518 (1991) (noting that generally applicable laws do not violate the First Amendment merely because their enforcement may have some incidental effects on ability to gather and report news); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) (targeting members of the press "poses a particular danger of abuse by the State").

The reason is clear. With generally applicable laws, there is "no fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency". *Minneapolis Star*, 460 U.S. at 585. In contrast, those political constraints are absent when laws single out the press for regulatory burdens. *Id.*; *see also Leathers*, 111 S. Ct. at 1443 ("When such a law applies only to a single constituency, however, it is insulated from this political constraint.").

[7] *See Minneapolis Star*, 460 U.S. at 592 (illicit legislative intent not necessary to subject law singling out the press to heightened scrutiny); *see also Leathers*, 111 S. Ct. at 1443 (noting that in *Minneapolis Star* "[w]e found no evidence of impermissible legislative motive . . . apart from the structure of the tax itself").

that the First Amendment precludes any government compulsion that overrides editorial discretion.[8] The proponents of a right of enforced access relied upon *Associated Press* for the proposition that "the First Amendment acts as a sword as well as a shield". *Id.* at 251. In rejecting that argument, this Court indicated that, anytime government coercion is required to implement "a remedy such as an enforceable right of access", "this at once brings about a confrontation with the express provisions of the First Amendment", *id.* at 254. The Court also stated that "[t]he clear implication has been that any such compulsion to publish that which 'reason tells them should not be published' is unconstitutional". *Id.* at 256.[9]

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[8] This is not to say that the remedies involved in either *Lorain Journal* or *Associated Press* are analogous to the must-carry provisions. They are not. The injunction in *Lorain Journal* prohibited the newspaper from refusing to deal with advertisers because they proposed to advertise in or through another medium; the paper was free to refuse to print advertisements for any other reason. Thus, unlike the must-carry provisions, there was no general right of compelled access and the impact on First Amendment rights was at most incidental. And, this Court has elsewhere recognized that any First Amendment interest in advertising ordinary commercial proposals is subject to limitation. *See, e.g., Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 378 (1973).

The decree in *Associated Press* is even less analogous to the must-carry provisions. Confronted with the argument that the district court decree "interferes with freedom 'to print as and how one's reason or one's interest dictates'", 326 U.S. at 20 n.18, this Court concluded that "[t]he decree does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published". *Id.* In contrast, the First Amendment impact of the must-carry provisions is direct and severe, compelling Time Warner to publish certain material even if it would not otherwise choose to do so. *See also* J.S. App. 54a (Williams, J., dissenting) ("[a]pplication of a test for 'incidental' burdens on speech seems highly artificial here").

[9] In making clear that the remedy in *Associated Press* had not infringed upon any editorial function, the *Tornillo* opinion emphasized that "beginning with *Associated Press*, the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print". 418 U.S. at 256. Appellee NAB is thus incorrect in asserting that remedies can override editorial discretion and not even "be subjected to First Amendment scrutiny". NAB 49

B. This Court's decision in *Red Lion* does not support the government's rational basis framework.

The government also proposes that it is permitted to enact content-based regulation of cable under *Red Lion*, subject only to a rational basis standard of review. Gov. 13. Necessarily, it is the government's position that the physical scarcity of the broadcast spectrum was only incidental to the result in *Red Lion*. That position, however, is inconsistent with *Red Lion* itself, which makes quite clear that scarcity is the *very reason* why broadcasters receive a lower level of First Amendment protection than other media speakers. *Red Lion*, 395 U.S. at 388 ("[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish"). Moreover, no decision from this Court since *Red Lion* suggests otherwise.[10]

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n.82. In fact, the exact opposite conclusion was reached by the Court of Appeals for the District of Columbia in *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1558 (D.C. Cir. 1984). Based on *Tornillo*, the court invalidated a remedial order imposed by the NLRB, because the order required the newspaper to publish an individual's column. *Id.* at 1557 (newspaper cannot be "compelled to publish that which it chose to withhold"); *see also id.* at 1558 ("the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content") (quoting *Tornillo*, 418 U.S. at 259) (White, J., concurring)).

[10] The decisions are uniform that physical scarcity is the critical and defining characteristic justifying the level of governmental intrusion permitted in the broadcast medium. *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 566-67 (1990) ("[w]e have long recognized that '[b]ecause of the scarcity of [electromagnetic] frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium'") (quoting *Red Lion*, 395 U.S. at 390); *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984) ("[t]he fundamental distinguishing characteristic of the new medium of broadcasting that, in our view, has required some adjustment in First Amendment analysis is that '[b]roadcast frequencies are a scarce resource [that] must be portioned out among applicants'") (quoting *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973)); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 799 (1978) ("*NCCB*") ("[t]he physical limitations of the broadcast spectrum are

Because physical scarcity is not at issue here, the government's newly found rationale should be rejected.[11]

The government's argument that *Red Lion* indicates that any content-based regulation of a dysfunctional "market in speech" need only satisfy rational basis scrutiny is also at odds with the decision in *League of Women Voters*. There, this Court invalidated a law prohibiting certain noncommercial educational broadcast stations from engaging in editorializing. 468 U.S. at 402. Emphasizing that, "[u]nlike common carriers", broadcasters have wide-ranging journalistic freedom under the First Amendment, *id.* at 378, the law was struck down under a test comparable to *O'Brien*. *Id.* at 402 (the "specific interests sought to be advanced . . . are either not sufficiently substantial or are not served in a sufficiently limited manner to justify the substantial abridgement of important journalistic freedoms which the First Amendment jealously protects").[12] The decision in *Democratic Nat'l Comm.* also struck down a governmental scheme for intruding too deeply upon the editorial function of broadcasters, concluding that a broadcast station need not grant a "right-of-access" to individuals interested in broadcasting

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well known"; "[i]n light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential"). If anything, the government's attempt here to expand the scarcity doctrine cuts against the prevailing trend in the law that has questioned its validity. *See, e.g., League of Women Voters*, 468 U.S. at 376 n. 11.

[11] In its submission to this Court in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) ("*Preferred*"), the government argued that *Red Lion* is confined to cases involving "scarcity of the electromagnetic spectrum" and that "[w]hatever one's views of *Red Lion*, it plainly has no application" to cable television. Govt. Brief (filed Feb. 24, 1986) at 20 n.13 (citation omitted) (a copy of this brief has been lodged with the Clerk of this Court). There have been no legal developments since that would justify the government's conversion.

[12] Ironically, as is true of the must-carry provisions, the Department of Justice initially declined to defend the law at issue in *League of Women Voters*, believing the law violated the First Amendment, only reversing course to defend it upon a change in Administrations.

editorial advertisements. 412 U.S. at 127.[13] If the rational basis framework now put forth by the government under the mantle of *Red Lion* does not even apply when government intrudes too deeply upon the editorial functions of broadcasters, there is certainly no reason why such a standard should apply when such an intrusion is applied to cable.[14]

The government's thesis also cannot be squared with *Tornillo* in this regard. Without ever citing *Red Lion*, *Tornillo* held that economic scarcity—or "dysfunction", in the government's parlance—did not justify "corrective" governmental action. The "dysfunction" in *Tornillo* was the prevalence of one-newspaper

[13] The Court noted that, if a broadcaster were compelled to grant such access and such access were subject to the fairness doctrine, "[t]he result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues". *Id.* at 124.

[14] Appellees impugn the editorial activities engaged in by cable operators. *See, e.g.*, Gov. 43; NAB 31; PBS 38-39. Coming from the government, that is surprising. At the time of *Preferred*, it stated: "[s]urely this enterprise [cable] is every bit as much the enterprise of speech, of the communication of ideas, as are the traditional enterprises of newspaper and book publishers". Govt. Brief, *supra* n. 11, at 9. And, although appellee PBS may contest whether cable operators engage in editorial activity "of the kind exercised by newspapers", PBS Resp. to Time Warner's Statement of Material Facts ¶¶ 7-11 (J.A. 352-53), cable's membership in the press and the range of its editorial activities have been established in this record, J.A. 198-201 (establishing that Time Warner engages in a wide variety of protected editorial activity, including selecting programming from among the diverse array of available sources and originating its own programming), and recognized by this Court. *See Leathers*, 111 S. Ct. at 1442 ("[c]able television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press'."); *Preferred*, 476 U.S. at 494 ("through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats"); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) (cable operators possess a "significant amount of editorial discretion regarding what their programming will include"). On this point, it is also fundamentally inconsistent for the NAB to disparage the First Amendment editorial activities of cable and yet to claim that "paramount" First Amendment interests require government to be the arbiter of what programming subscribers should receive.

towns and the inordinate expense of starting a newspaper. 418 U.S. at 249 n.13 (effective competition existed in only four percent of the nation's large cities); *id.* at 251 (economic factors "made entry into the marketplace of ideas served by the print media almost impossible"). However, this failed to justify any governmental intrusion upon the editorial discretion of a member of the press. *Tornillo* thus forecloses the government's rationale for rational basis review.[15]

II. STRICT SCRUTINY SHOULD BE APPLIED TO THE MUST-CARRY PROVISIONS.

Although the government seeks to articulate a rationale that would justify intrusive, content-based regulation of cable, the broadcast appellees, particularly the NAB, resist that approach, arguing at length that the must-carry provisions are not content-based. This approach is not easy: these provisions require cable carriage of all local broadcast television stations and thereby fundamentally alter the content of programming provided to subscribers—an effect that under any "commonsense understanding of the term" would indicate that these provisions are content-based. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516-17 (1993).

The NAB argues that government's regulatory purpose *always* controls the appropriate First Amendment standard of review.

[15] Because physical scarcity is not present with respect to cable, the government and other appellees—in order to develop a theory of "dysfunction" different from the economic scarcity rejected in *Tornillo*—make reference to various governmental benefits cable has purportedly received. Gov. 27-29; PBS 29-31. These "benefits", if any, do not supply a basis for intrusive, content-based regulation of the cable industry. Newspapers and magazines today, for example, receive a massive subsidy from the federal government in the form of significantly discounted mailing rates. 39 U.S.C. § 3685. Necessarily, however, that benefit is not a sufficient basis to impose such restrictions. *See Turner Broadcasting System, Inc. v. FCC*, 113 S. Ct. 1806, 1807-08 (1993) (Rehnquist, C.J., in chambers) ("Congress plainly could not impose the must-carry provisions on privately owned newspapers"). If appellees' theory is actually that the must-carry provisions can be viewed as a condition on governmental benefits, Time Warner strongly disagrees with that view and invites the Court's attention to the more thorough response presented by appellant NCTA.

NAB 20 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)); *see also* NAB 22. If this were in fact the only criterion, it would seem rare that any legislation would ever be subject to strict scrutiny. For unless Congress made its legislation suspect by providing evidence of a content-based purpose, the legislation would be subject to review under *O'Brien*.

Although the NAB is wrong that only such a purpose results in strict scrutiny, remarkably, Congress provided exactly such evidence for the must-carry provisions by adopting "findings" that clearly reveal its judgments about the content of broadcast programming. *See, e.g.*, § 2(a)(11) ("[b]roadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate").[16] Recognizing that the must-carry provisions would be content-based even under its purpose test, the NAB thus crafts an exception—in an attempt to disclaim Congress's unexpected "error"—by arguing that content-neutral justifications do not "lose their content-neutral character merely because Congress made *additional* findings". NAB 24 (emphasis added). Elsewhere, the NAB characterizes the content-related findings as "ancillary". NAB 25. However, there is no principled basis for considering these findings to be any less indicative of a content-based purpose than any other finding.[17]

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[16] *See also* Time Warner Nov. 9, 1993 Br. at 18-19 & nn. 16-17 (citing certain content-based findings and legislative materials).

[17] The NAB also appears to concede that the findings pertinent to *noncommercial* must-carry obligations are content-based, NAB 25 n.40, but seeks to limit the "taint" of those findings. *Id.* ("Congress also made separate findings, relevant only to the *noncommercial* must-carry provision"; those findings "do not pertain to the commercial must-carry provision"). The government's overarching purpose to favor broadcasters because of their programming content cannot be so parsed. Indeed, the NAB's effort to segregate commercial broadcasters from public television stations ignores that broadcasters are the programmers over which government has the most content control. By mandating cable carriage of broadcast stations, Congress attempts to bootstrap its content regulation of the broadcasting industry into content regulation of the cable industry. And, the government's effort is no less suspect because Congress has chosen to favor an entire *group* of speakers as opposed to individual speakers.

The NAB also provides a glaring example of the flawed nature of its purpose test by suggesting that if the must-carry provisions were struck down because of the content-related findings referred to above, "Congress could simply excise those findings and re-enact a constitutional law". NAB 25. This point exactly makes Time Warner's point. *See* Time Warner Nov. 9, 1993 Br. at 15 ("[p]rovided Congress can cobble up an appropriate set of content-neutral 'findings', it can successfully shield virtually any statutory scheme from judicial review"). Under the NAB's governmental purpose test, thus, a creative (though careful) legislature could effectively subvert the First Amendment.

To guard against that danger, this Court has indicated that the government's purpose is not the determinant of whether legislation is content-based. *Discovery Network* and *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991)—two decisions that the NAB contends "expressly follow" its purpose test, see NAB 22—quite clearly make this point. In *Discovery Network*, the content-neutral justifications of safety and aesthetics did not prevent the legislation from being considered content-based. *Discovery Network*, 113 S. Ct. at 1516-17. In *Simon & Schuster*, the Crime Victims Board offered a nearly identical argument to that made by the NAB here, contending that the "Son of Sam" law cannot be constitutionally suspect unless "the legislature intends to suppress certain ideas". *Simon & Schuster*, 112 S. Ct. at 509. This Court flatly rejected that assertion.[18] The law was held to be content-based,[19] even though the Court declined to analyze it under *Ward* or *Renton*. *See* 112 S. Ct. at 511 n.**. The Court

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[18] *Id.* ("Simon & Schuster need adduce 'no evidence of an improper censorial motive'") (citation omitted).

[19] *Id.* at 508 ("[t]he Son of Sam law is . . . a content-based statute"). The State was therefore required to satisfy strict scrutiny. *Id.* at 509 ("'the State must show that its regulation is necessary to further a compelling state interest and is narrowly drawn to achieve that end'") (citation omitted).

indicated that those cases applied to laws having "*incidental effects* on some speakers". *Id.* (emphasis added). If anything, *Discovery Network* and *Simon & Schuster* strongly support appellants' position that the purpose test applies *only* when the effects upon speech are incidental and when strict scrutiny does not apply under other prevailing principles of the First Amendment (because they compel speech; because they impermissibly favor certain speakers over others; or because they single out the press). Indeed, it is counterintuitive to suggest that the proper approach for conducting judicial review is to examine the justification for a regulation before evaluating its impact.[20]

Appellants rely upon the line of cases that requires strict scrutiny for laws compelling speech.[21] Appellants also rely on that part of the decision in *Tornillo* that rejected *any* intrusion upon the editorial functions of members of the press. 418 U.S. at 258.[22] Under these cases, the must-carry provisions are

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[20] Based on *NCCB* and *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987) ("*SFAA*"), the NAB posits that even content-based laws do not trigger strict scrutiny, if accompanied by a neutral governmental purpose. *NCCB*, which upheld the newspaper-broadcast license cross-ownership ban, is inapposite; it relies upon government's regulatory authority over the physically limited electromagnetic spectrum. *NCCB*, 436 U.S. at 799 ("[i]n light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential"). In *SFAA*, the law at issue provided the United States Olympic Committee with certain trademark protection against commercial uses of the word "Olympic". The basis of trademark law—to allow entities to obtain property rights in a word and constitutionally to prohibit certain uses by others—is certainly not present here. *See* 483 U.S. at 532.

[21] *See, e.g., Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795-96 (1988); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 9 (1986) (plurality opinion); *Wooley v. Maynard*, 430 U.S. 705, 716-17 (1978); *Tornillo*, 418 U.S. at 256-58; *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943). Some appellees argue that *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), controls the outcome in this case. *See, e.g.*, NAB 27-28; Gov. 45-46. For the reasons explained in the opening briefs of Time Warner and NCTA, Time Warner Nov. 9, 1993 Br. 22-23; NCTA Nov. 9, 1993 Br. 20-21, as well as in NCTA's reply brief, it does not.

[22] The NAB appears to argue that no significant editorial intrusion is present because "[i]n the near future, typical cable systems will have a capacity

constitutionally suspect for requiring cable operators to provide subscribers with programming the operators do not want to carry (and that subscribers often do not want to receive).[23] The NAB responds that such laws are not suspect unless the "government's purposes are related to communicative impact". NAB 28. This, however, is merely another way of arguing that *Riley* does not mean what it says.[24] Yet, *Riley* unequivocally establishes that: (1) compelled silence and compelled speech are equivalent under the First Amendment (487 U.S. at 796-97); (2) "a statute regulating how a speaker may speak directly affects that speech" (*id.* at 789 n.5); and (3) "[m]andating speech that a speaker would not otherwise make necessarily alters the content of that speech" and is "content-based" (*id.* at 795), all principles relevant here.[25]

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of 500 channels or more". NAB 1 n.2. As a factual matter, that is a gross exaggeration. Moreover, it incorrectly implies that constitutional adjudication should ignore injury *now* based upon speculation as to what might happen in the future. Here, the uncontroverted record indicates that, *at present* and for the immediate future, there are fewer channels than programming sources. *See, e.g.*, Klein Aff. ¶¶ 6-7 (J.A. 303) (noting that 128 cable programmers presently exist but that average channel capacity for cable systems is 40 channels); *id.* ¶ 8 (J.A. 304) (2,000 cable systems, serving one-third of all subscribers, currently have no excess channel capacity); *id.* ¶ 9 (J.A. 304) (documenting that even in a relatively small system of about 7,600 subscribers, it would cost more than $3 million to increase channel capacity from 52 channels to 61 channels). In any event, the NAB's point is irrelevant. The newspaper in *Tornillo* could certainly have added pages, but that did not alter the impermissible nature of government's intrusion upon its editorial function. The speech of cable operators and programmers is similarly infringed by requiring even one channel to be turned over to broadcast television stations.

[23] Although Time Warner focuses here upon the constitutional arguments offered from the perspective of a cable operator, Time Warner is also a cable programmer and has been directly injured in that capacity by the must-carry provisions. Time Warner respectfully invites the Court's attention to the more detailed legal discussions offered from the programmers' perspective by appellants Turner Broadcasting and The Discovery Channel.

[24] For the reasons discussed above, pp. 11-14, it is also misguided to say that Congress has not aimed at communicative impact here.

[25] The NAB persists in its effort to establish that *Riley* does not mean what it says by parading a list of government compelled disclosure requirements that

III. APPELLEES ADVOCATE UNDUE DEFERENCE TO CONGRESS, PARTICULARLY GIVEN THE FIRST AMENDMENT INTERESTS AT ISSUE.

The must-carry provisions purportedly further two governmental interests: enhancing diversity and preservation of local broadcasting. With respect to the first interest, appellees fail to answer the argument that a statutory scheme impairing the speech of a very diverse group of speakers (*i.e.*, cable programmers) to further the speech of a homogenous group of speakers (*i.e.*, local broadcast stations) cannot advance a diversity agenda. To the contrary, such a scheme affirmatively undermines that agenda.[26] And, it is an illegitimate exercise of governmental

might be suspect under this reading, including compliance with subpoenas, tax and securities laws, as well as common carrier obligations. The NAB's fears are unfounded. *First*, these laws are general laws that apply to all, not laws singling out the communicative activity of members of the press. *Second*, with the exception of common carriers who do not engage in any speech when acting in that capacity, these contexts clearly present compelling interests. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 700 (1972) (holding that compelling governmental interest presented in context of subpoena); *In re Grand Jury Proceeding*, 842 F.2d 1229, 1236 (11th Cir. 1988) ("no doubt" that compelling governmental interest existed where subpoena served for tax investigation); *Bradley v. United States*, 817 F.2d 1400, 1405 (9th Cir. 1987) (upholding penalty against taxpayer who filed anti-war protest as return—government had compelling interest in maintaining sound tax system); *L.P. Acquisition Co. v. Tyson*, 772 F.2d 201, 207 (6th Cir. 1985) (take-over disclosure requirements provided for by state law served "state's compelling interest in protecting its residents"). *Third*, the Court has indicated that compelled disclosures of truth, at least in the commercial speech context, present less protected First Amendment interests. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *id.* at 651 n.14 ("[t]he right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right").

[26] Cable television viewers will once again be relegated to the "vast wasteland" of broadcast television programming. *See* Time Warner Nov. 9, 1993 Br. at 44-45. In this respect, it is curious that a number of appellees contend this statutory scheme advances the "paramount" interests of viewers and listeners. Apparently, cable television viewers do not factor into that equation, because cable viewers are denied programming like "C-Span" that they want so that unwanted broadcast television stations (*e.g.*, broadcast religious or home shopping services) can obtain carriage.

power to further a diversity agenda at the cost of certain speakers' rights. *See* Time Warner Nov. 9, 1993 Br. at 45 & n.51.

With respect to the second interest—preservation of local broadcasting—appellants have shown that the system of local broadcasting is not at all in jeopardy. In response, appellees merely recite Congress's "findings" as if that somehow responds to that argument. Moreover, appellees urge that these "findings" are entitled to deference at a level that typically applies when legislation is reviewed under the rational basis standard.

The deference appellees suggest applies here amounts to essentially no scrutiny at all. That is, appellees ask this Court to uphold Congress's legislation merely because Congress has acted and given "reasons" for its action. That, erroneously, was the level of deference applied by the majority below—a level of deference that resulted in a judicial imprimatur upon this special interests' legislation.[27] However, deference to Congress does not mean abdicating meaningful judicial review. Moreover, this Court's decisions indicate that the degree of deference to be accorded Congress should vary inversely with the level of scrutiny applied. In other words, there is a correspondingly lower level of deference accorded to Congress's findings in the context of burdens imposed upon fundamental rights—rights that typically trigger strict judicial scrutiny.[28] Particularly in the First Amendment context, this principle is evident.[29]

[27] *See, e.g.*, J.S. App. 67a ("[i]f findings as scantily connected to the conclusion as these can justify must-carry, then the door is open—even in the area of First Amendment rights—to exercise of the most naked interest-group preferences") (Williams, J., dissenting).

[28] It would be anomalous for the Court to require, on the one hand, a compelling interest, but then, on the other hand, defer to virtually whatever interest Congress identifies because it has made certain "findings".

[29] *See, e.g., Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989) ("whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law"); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829,

Meaningful judicial review is critical in any First Amendment case but it is especially so here, where Congress has purportedly taken corrective action in the name of the First Amendment,[30] proposing certain "findings" to justify that action.[31] Although Congress properly has the responsibility to amass factual data and make findings, courts must be especially chary of "predictive judgments" that justify infringement of First Amendment rights. To that end, had the majority below not erroneously accorded nearly complete deference to the findings referred to above, it would have concluded that the broadcasting industry was not in

843 (1978) ("[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"). The NAB essentially concedes this principle by distinguishing the low level of deference applied in *Sable* and *Landmark* on the basis that strict scrutiny was triggered. NAB 46.

This is not to say judicial review is not appropriate unless strict scrutiny applies. For example, in the context of commercial speech, the court has required that the government "demonstrate that the harms it cites are real" *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993) (applying intermediate scrutiny and requiring that predictive judgments be sustained by meaningful evidence); *see also Lamprecht v. FCC*, 958 F.2d 382, 393 (D.C. Cir. 1992) (Thomas, J.). And, even in those cases where courts have been particularly attentive to Congress's factfinding, some independent review is appropriate. *See, e.g., Metro Broadcasting*, 497 U.S. at 579-80 (according great weight to legislative findings did not preclude court from engaging in lengthy review to conclude that findings were supported by "a host of empirical evidence").

[30] In our constitutional framework, the First Amendment is a constraint on Congress's power, not a source of power. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2716 (1992) (Kennedy, J., concurring).

[31] That Congress declares its policies constitutional is of no import. *See Sable*, 492 U.S. at 129 (Court must decide whether Congress has violated the Constitution "particularly" when "the Legislature has concluded that its product does not violate the First Amendment"). The need for adequate review is underscored in this case, where the executive, a co-equal branch of the government, initially declined to defend the legislation on constitutional grounds.

imminent peril—a conclusion that requires invalidation of the must-carry scheme.[32]

Even if the governmental interests purportedly advanced by the must-carry provisions could be viewed as implicated on this record, appellees fail to indicate why these provisions do not fail on tailoring grounds. For one thing, a mandate to carry even the most unpopular broadcast stations does nothing to resolve their fundamental problem—no one wants to watch them.[33] For another thing, the legislation is remarkably overbroad. It protects all local broadcast stations whether or not those stations are truly economically imperiled. Finally, there is an obviously less speech restrictive alternative—subsidies for broadcast stations. Appellees do not contend that subsidies would be ineffective in advancing the government's purported interests.[34] Rather, the NAB argues that a subsidy "would be a serious drain on public resources", NAB 48-49, but that is certainly not an adequate basis to trammel particular speakers' First Amendment rights. The NAB also argues that a subsidy "would inject an unwanted governmental

[32] Amici ACLU agrees that the decision below should be vacated because, under *Sable*, the majority below failed to apply sufficient scrutiny. ACLU 15-18. However, ACLU suggests that this case should be remanded to the three-judge district court for that reason. This suggestion should be rejected. None of the parties disputes what comprises the record before Congress but rather whether this record provided an adequate factual predicate for the predictive judgments or "findings" Congress made—findings critical to determining the constitutionality of these provisions. That is, it is the conclusions to be drawn from the facts and not the facts themselves that are in dispute. These are issues of law, and it is certainly appropriate for this Court to make that evaluation as it often has when striking down legislation on First Amendment grounds. *See, e.g., Sable*, 492 U.S. at 129; *Landmark*, 435 U.S. at 843-44.

[33] The government admits this point when it acknowledges that "eventually" such stations will fail, even if carried on cable. Gov. 41 n. 28. Apparently, in the government's view, it is appropriate that this legislation forces cable operators to wait for that result, thereby depriving viewers of what they truly want to see until it occurs.

[34] Time Warner respectfully refers the Court's attention to the discussion by the Discovery Channel of another effective, yet less restrictive alternative, the A/B switch.

presence into what has long been a privately owned medium", NAB 49, an accurate statement with respect to the must-carry provisions and cable, but one that is completely disingenuous with respect to the broadcasting industry: the government's presence there is continuous, pervasive and already in place.

CONCLUSION

For the foregoing reasons, the must-carry provisions, 47 U.S.C. §§ 534 and 535, should be declared unconstitutional and the decision of the three-judge district court should be reversed.

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Respectfully submitted,

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